72-522

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IN THE

# Supreme Court of the United States

October Term, 1972

NO. 72-522

BEN J. ROGERS, ET AL, *Petitioners*

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Respondent*

## PETITION FOR WRIT OF CERTIORARI

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## SUBJECT INDEX


| | Page |
|---|---|
| Opinion Below | 1 |
| Jurisdiction | 1 |
| Questions Presented | 2 |
| Statutes Involved | 2 |
| Statement of the Case | 2 |
| Reasons for Granting the Writ | 3 |
| Prayer | 8 |
| Appendix A—Summary Opinion of Court of Appeals | 9 |
| Appendix B—Relevant Portions of Civil Rights Act of 1964 | 13 |


## INDEX OF AUTHORITIES


| CASES | Page |
|---|---|
| EEOC v. United Association of Journeymen and Apprentices, et al, 488 F.2d 408 | 3, 4 |
| EEOC v. Woolco Department Store, 321 F. Supp. 811 | 3, 5 |

| UNITED STATES STATUTES | |
|---|---|
| 28 USC §1254(1) | 2 |
| 42 USC §2000e-4(f)(6) | 2 |
| 42 USC §2000e-5(e) | 2 |
| 42 USC §2000e-5(i) | 4 |
| 42 USC §2000e-8(c) | 2 |
| 42 USC §2000e-9(c) | 2 |
| 42 USC §2000e-9(d) | 2 |
| 42 USC §2000h | 2 |
| Title VII, Civil Rights Act of 1964 | |
| §706(e) | 6 |
| §709 | 6 |
| §709(c) | 6 |
| §710(c) | 6 |
| §710(d) | 6 |

| MISCELLANEOUS | |
|---|---|
| Equal Employment Opportunity Act of 1972, Public Law 92-261, March 24, 1972, 40 LW 51, at 53 | 7 |
| The State of the Judiciary—1970, 54 ABAJ 933 (1970) | 7 |

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## PETITION FOR WRIT OF CERTIORARI

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*To The Honorable Supreme Court of the United States:*

Ben J. Rogers, et al pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on July 20, 1972.

### Opinion Below

The summary opinion of the Court of Appeals has not yet been reported and is included herein as Appendix A.

### Jurisdiction

The judgment of the Court of Appeals was entered July 20, 1972. Petitioners' timely Petition for Rehearing

was overruled August 14, 1972, following which Petitioners' Motion for Appropriate Stay of Mandate was granted on August 24, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. The standing of EEOC to bring and prosecute this suit for injunction compelling future information reports.
2. EEOC's right to enforce Title VII of the Civil Rights Act of 1964 by injunction.

## STATUTES INVOLVED

The statutory provisions of the Civil Rights Act of 1964 here involved are 42 U.S.C. § 2000e-4 (f) (6), 42 U.S.C. § 2000e-5(e), 42 U.S.C. § 2000e-8(c), 42 U.S.C. § 2000e-9(c) and 42 U.S.C. 2000e-9(d).

Their relevant portions are included in Appendix B.

## STATEMENT OF THE CASE

EEOC was plaintiff and sought:

(1) Information Reports for prior years;

(2) Punitive damages;

(3) An injunction compelling the filing of reports in future years; and

(4) The sanctions of criminal contempt under 42 U.S.C. § 2000h. (App. 35)

The only complaint upon appeal is the Trial Court's refusal to enjoin defendants (petitioners) from failing to file information reports in future years.

The Trial Court denied this relief by summary judgment, The Court of Appeals held:

> "The assertion that the EEOC somehow has no standing to prosecute the present action must be flatly and unequivocally rejected. Beyond any possibility of doubt Congress conferred upon the Commission explicit statutory authority to seek judicial relief against an employer's willful noncompliance with the reporting provisions of Title VII[3]. Since the Act prescribes no other civil or criminal penalties for such noncompliance, an injunction is obviously the only effective remedy for a deliberate refusal to obey the law." Opinion, pp. 2, 3

## REASONS FOR GRANTING THE WRIT

There is no reported decision like this. Yet, the same fact potential inheres in every complaint filed under the Civil Rights Act of 1964. The Court has placed a construction upon the Act of Congress which not even EEOC urges. Not even EEOC contended it had the express statutory authority suggested by the precocious opinion of the Court of Appeals.

Two reported decisions plainly enunciate the EEOC's lack of standing to bring and prosecute such suit. *EEOC v. United Association of Journeymen and Apprentices,* et al, 438 F.2d 408 (C. A. 6th, 1971; cert. den.); *EEOC v. Woolco Department Store,* 321 F.Supp. 811 (E.D. La.; 1971) The Court of Appeals made no reference to either decision.

In *EEOC v. United Association of Journeymen and Apprentices, et al* the Sixth Circuit noted:

> "The union claims that Congress denied EEOC power to initiate actions to enforce the Civil Rights

Act of 1964; that EEOC's filing of this action was ultra vires; and that the District Judge should have dismissed the complaint and that we must now do so.

[1] We agree with appellant in part. We have no doubt that Congress did intend to withhold from EEOC the power to bring a complaint of violation of the Civil Rights Act. The history of the legislative compromise shows that the initiation of complaints under the Act was reserved to the United States Attorney General and to private litigants." 438 F.2d 412

The only standing EEOC has as a plaintiff is to compel obedience with prior judicial orders. 42 U.S.C. § 2000e-5(i); ***EEOC v. United Association of Journeymen and Apprentices, et al,*** **438 F.2d 414**

As Judge Weick, concurring in part and dissenting in part, said in ***United Association of Journeymen and Apprentices, et al,*** **438 F.2d 408, at 415:**

"Title VII of the Civil Rights Act of 1964 withheld power from EEOC to institute action to compel compliance with the Act or even to intervene in an action brought by an aggrieved party. The only power to institute such an action or to intervene in an action by an aggrieved party was vested by Congress in the Attorney General. 42 U.S.C. § 2000e-6(a); 42 U.S.C. § 2000e-4(f).

EEOC was authorized only to institute proceedings to compel compliance with judicial orders.

* * *

The legislative history of Title VII reveals that as originally passed by the House of Representatives, the bill not only authorized but obligated EEOC to institute actions to enforce the Act. These enforce-

ment provisions were stricken by compromises worked out in the Senate by Senators Mansfield, Dirksen and Humphrey which effected a 'transfer of litigating responsibilities from the Commission to the Attorney General.' Legislative History of Title VII and XI of Civil Rights Act of 1964, U. S. Equal Employment Opportunity Commission, pp. 2057, 3005. H.R. 7152 § 707.

* * *

It is not the function of the Courts to supply to administrative agencies powers denied to them by Congress, which created such agencies." 438 F.2d 415

District Judge Cassibry's decision in *Woolco* was directly related to an investigation being conducted by EEOC upon a charge filed with it. Very plainly a proper charge was filed and EEOC was empowered to investigate such charge. Apparently while in the course of such investigation EEOC determined that the employer was interfering with the Commission's investigative process and suit was brought by EEOC for injunctive relief from such interference. Such suit was dismissed because the Court lacked jurisdiction of the subject matter and "because the plaintiff does not have standing to bring the action". 321 F.Supp. 812

Judge Cassibry noted where relevant:

"[1] Title VII provides that the district court shall have jurisdiction over the following actions: actions brought by persons claiming to be aggrieved by the alleged unlawful employment practice and who have complied with the prescribed procedures, and actions brought by the Attorney General against persons engaging in a pattern or practice of resistance to the full enjoyment of any rights secured by Title VII.

> This action is not brought by an aggrieved party nor by the Attorney General and therefore jurisdiction does not lie under Title VII."
>
> "[2] The EEOC is established as an administrative agency, having the right and authority to make investigations, subpoena witnesses and records and attempt to resolve employment disputes by conciliation, conference and persuasion. Unlike many other governmental agencies it is not empowered to enforce the Act it was established to administer. * * * The only proceedings which the Commission is authorized to bring in the district court are those specifically set out in the Act. These relate principally to enlisting the aid of the court in compelling cooperation with the Commission's discovery procedures. See §§ 706(e), 710(c) and (d)." 321 F.Supp. 813

Neither § 706(e), § 710(c) or § 710(d) is related to this proceeding.

The Information Reports which are the subject matter of this injunction proceeding are set out in § 709(c). Very plainly there is no authority granting by such § 709 to enforce same by judicial process.

As Judge Cassibry so aptly noted:

> "To acknowledge EEOC as a proper party plaintiff in this suit would greatly extend rather than merely protect the jurisdiction given it by statute. It would alter the basic nature and function of the Commission from that of an agency for investigation, conciliation and assistance to one for enforcement. This is contrary to the clear language of Title VII which created the Commission. Such a basic change in the nature and function of an agency must be made by Congress if it is to be made at all. Protection to the Commission's jurisdiction is provided for in the Act itself, in the procedure it establishes for compelling

> discovery and in its authorization of suit by the Attorney General where there appears to be a 'pattern or practice' of violation." 321 F.Supp. 813

The lack of EEOC standing to bring this suit was recognized by Congress. See the Equal Employment Opportunity Act of 1972, Public Law 92-261, March 24, 1972; 40 LW 51, at 53. There, for the first time, Congress empowered the Commission to make application to a district court to require an employer to file the Information Reports.

However, the Circuit Court in its summary decision did not even consider this. Rather, the Court said:

> "Since the Act prescribes no *other* civil or criminal penalty for such non-compliance, an injunction is the only effective remedy for a deliberate refusal to obey the law".

Now, the injunction denied by Congress has been judicially engrafted to the Act as *penalty* for non-compliance. Such penalty is expressly denied by Congress, even in the amended Title VII. However, if the Fifth Circuit opinion is allowed to stand in this case a veritable flood tide of penalty suits will follow.

As the Chief Justice so aptly noted:

> "Where courts are not able to keep up with their work, it suggests the need for a hard, new look at our procedures". Burger, *The State of the Judiciary*—1970, 54 ABAJ 933 (1970)

Such procedure at which we must take a "hard new look" is obviously that wherein the injunction is used as a punishment or penalty when none is congressionally mandated.

## PRAYER

Petitioners pray that the Court issue the Writ of Certiorari, reverse the judgment of the Court of Appeals and determine there was no abuse of discretion by the District Court in denying the injunction.

Respectfully submitted,

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## APPENDIX A

IN THE

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

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No. 72-1783

Summary Calendar*

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

versus

ROGERS BROTHERS, INC.,

Defendant-Appellee.

---

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

versus

BEN J. ROGERS, SOL J. ROGERS, ET AL,

Defendants-Appellees.

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*Appeal from the United States District Court for the Eastern District of Texas*

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(July 20, 1972)

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Before BROWN, Chief Judge, GOLDBERG and MORGAN, Circuit Judges.

PER CURIAM: The Equal Employment Opportunity Commission (EEOC) filed suit against six individual

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* Rule 18, 5 Cir., see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

defendants and two partnerships[1] to compel their compliance with the reporting procedures prescribed by section 709(c) of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-8(c).[2] The disputed reports were eventually submitted to the Commission several months later during extensive pretrial proceedings. We vacate the summary judgment for the defendants insofar as it denies an injunction and remand with instructions that the District Court restrain future violations of the Act unless the defendants are able to show affirmatively that they will comply with the law and that an injunction is therefore not needed.

The assertion that the EEOC somehow has no standing to prosecute the present action must be flatly and unequivocally rejected. Beyond any possibility of doubt Congress conferred upon the Commission explicit statutory authority to seek judicial relief against an employer's willful noncompliance with the reporting provisions of

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1. The complaint named Ben J. Rogers, Sol J. Rogers, Nathan Jay Rogers and Victor J. Rogers (doing business as Rogers Brothers) and Dr. N. Jay Rogers and Dr. S. J. Rogers (doing business as Texas State Optical). Although other defendants were initially involved, the Commission does not appeal from the District Court's determination that they were not "employers" within the meaning of Title VII.

2. "Except as provided in subsection (d) of this section, every employer, employment agency, and labor organization subject to this subchapter shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom, as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this subchapter or the regulations or orders thereunder."

The Commission's regulations amplifying the reporting requirements and prescribing a standard form "Employer Information Report EEO-1" are contained in 29 C.F.R. § 1602.7-9.

Title VII.[3] Since the Act prescribes no other civil or criminal penalties for such noncompliance, an injunction is obviously the only effective remedy for a deliberate refusal to obey the law.

Moreover, the fact that the recalcitrant employers here have belatedly produced the reports under fire after an unsuccessful five-year effort by the Commission to secure voluntary compliance is of virtually no significance. "The power to grant injunctive relief survives the discontinuance of the illegal conduct sought to be enjoined. The purpose of an injunction is to prevent future illegal and wrongful acts. The [defendants'] past conduct is a relevant factor to be considered."[4] *Offner v. Shell's City, Inc.*, 5 Cir., 1967, 376 F.2d 574, 576; *United States v. Oregon State Medical Society*, 1952, 343 U.S. 326, 333, 72 S.Ct. 690, 695-96, 96 L.Ed. 978, 985; *Plaquemines Parish School Board v. United States*, 5 Cir., 1969, 415 F.2d 817, 824; *Bailey v. Paterson*, 5 Cir., 1963, 323 F.2d 201, 205-06, *cert. denied sub nom. City of Jackson v. Bailey*, 1964, 376 U.S. 910, 84 S.Ct. 666, 11 L.Ed.2d 609; see also *United States v. Edwards*, 5 Cir., 1964, 333 F.2d 575, 581 (dissenting opinion) and cases cited therein. For an illustrative example of our traditional approach to situations in which employers have deliberately violated Fed-

3. "* * * if any person required to comply with the provisions of section 2000e-8(c) or (d) of this title fails or refuses to do so, * * * the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, have jurisdiction to issue to such person an order requiring him to comply with the provisions of section 2000e-8(c) or (d) of this title * * *." 42 U.S.C.A. § 2000e-9(b).

4. Texas State Optical has been here before under similar circumstances. See Rogers v. Equal Employment Opportunity Commission, 5 Cir., 1971, 454 F.2d 234, *cert. denied*, 1972, ____U.S.____, ____ S.Ct.____, ____L.Ed.2d____ [40 U.S.L.W. 3568, May 30, 1972].

eral legislation providing for fair employment, see *Goldberg v. Mathews,* 5 Cir., 1962, 303 F.2d 814.

While this record contains abundant evidence that the defendants have consistently declined in the past to submit the required reports, we are unwilling to make the initial forecast of what their course may be in the future. Nevertheless, we may hold on these facts that injunctive relief is mandatory unless the District Court finds on the basis of clear and convincing proof that there exists no reasonable probability of further noncompliance with the reporting provisions of the Act. *United States v. Edwards, supra.* The burden of negating that probability lies with the defendants, and in these circumstances it will be a monumental one. Cf. *United States v. W. T. Grant Co.,* 1953, 345 U.S. 629, 633, 73 S.Ct. 894, ____, 97 L.Ed. 1303, 1309; *Goldberg v. Mathews, supra.*

VACATED AND REMANDED.

## APPENDIX B

42 U.S.C. § 2000e-4(f) (6)

(f) The Commission shall have power—

(6) to refer matters to the Attorney General with recommendations for intervention in a civil action brought by an aggrieved party under section 2000e—5 of this title, or for the institution of a civil action by the Attorney General under section 2000e—6 of this title, and to advise, consult, and assist the Attorney General on such matters.

42 U.S.C. § 2000e-5(e)

(e) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) of this section (except that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this subchapter, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint

an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (b) of this section or the efforts of the Commission to obtain voluntary compliance.

42 U.S.C. §2000e-8(c)

(c) Except as provided in subsection (d) of this section, every employer, employment agency, and labor organization subject to this subchapter shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom, as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this subchapter or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this subchapter which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purpose of this subchapter, including, but not limited to, a list of applicants who wish to participate in such program, including the

chronological order in which such applications were received, and shall furnish to the Commission, upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may (1) apply to the Commission for an exemption from the application of such regulation or order, or (2) bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief.

42 U.S.C. §2000e-9(c)

(c) Within twenty days after the service upon any person charged under section 2000e—5 of this title of a demand by the Commission for the production of documentary evidence or for permission to examine or to copy evidence in conformity with the provisions of section 2000e—8(a) of this title, such person may file in the district court of the United States for the judicial district in which he resides, is found, or transacts business, and serve upon the Commission a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or

in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this subchapter or with the limitations generally applicable to compulsory process or upon any constitutional or other legal right or privilege of such person. No objection which is not raised by such a petition may be urged in the defense to a proceeding initiated by the Commission under subsection (b) of this section for enforcement of such a demand unless such proceeding is commenced by the Commission prior to the expiration of the twenty-day period, or unless the court determines that the defendant could not reasonably have been aware of the availability of such ground of objection.

42 U.S.C. §2000e-9(d)

(d) In any proceeding brought by the Commission under subsection (b) of this section, except as provided in subsection (c) of this section, the defendant may petition the court for an order modifying or setting aside the demand of the Commission.

Pub. L. 88-352, Title VII, §710, July 2, 1964, 78 Stat. 264.

## APPENDIX C

IN THE

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

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No. 72-1783
Summary Calendar*

---

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

versus

ROGER BROTHERS, INC.,

Defendant-Appellee.

---

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant

versus

BEN J. ROGERS, SOL J. ROGERS, ET AL,

Defendants-Appellees.

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*Appeal from the United States District Court for the Eastern District of Texas*

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(August 17, 1972)

Before BROWN, Chief Judge, GOLDBERG and MORGAN, Circuit Judges.

PER CURIAM: IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

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*Rule 18, 5 Cir., see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.